

DECISION

W. J. Fall
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**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-214876

DATE: September 4, 1984

MATTER OF: Contract for development of geothermal resources at Naval Weapons Center, China Lake, California

DIGEST:

10 U.S.C. § 2481 does not bar the sale of electricity in excess of the needs of the Naval Weapons Center, China Lake, California, to Southern California Edison Company (SCE) by a Navy contractor. Congress intended that the excess energy generated at China Lake would be credited to other defense facilities, and there is no legally significant difference between the transfer of excess power by "wheeling" over SCE transmission lines to naval facilities remote from China Lake and the sale of such excess electricity to SCE by the contractor with subsequent purchase of identical amounts of electricity by the contractor at remote locations for delivery to the Navy.

By letter dated April 4, 1984, the Naval Facilities Engineering Command requested our views as to the propriety of a modification to a contract with the China Lake Joint Venture for the development of the geothermal resources at the Naval Weapons Center, China Lake, California. The contract, as presently drafted, provides for expansion of the electrical generating facility at the China Lake Weapons Center to 75 MW and requires delivery by the contractor of electricity excess to the needs of China Lake to other naval facilities in California. Because delivery of excess electricity to other naval facilities would require its sale to the Southern California Edison Company (SCE) and the purchase of similar amounts of electricity from that company or other utility companies at other locations, the Command has asked whether modification of the existing contract to that effect would be permissible. Specifically, the Command has asked whether such an arrangement would be in accord with 10 U.S.C. § 2481 (1982), which authorizes the sale of Navy generated electricity under limited circumstances. For the reasons discussed below, we conclude that 10 U.S.C. § 2481 is not a bar to the proposed electricity delivery arrangements.

The statutory provisions which authorize the development of geothermal resources by Department of Defense agencies are 10 U.S.C. §§ 2394 and 2689. Section 2689 provides that--

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"The Secretary of a military department may develop, or authorize the development of, any geothermal energy resource within lands under the Secretary's jurisdiction, including public lands, for the use or benefit of the Department of Defense if that development is in the public interest, as determined by the Secretary concerned, and will not deter commercial development and use of other portions of such resource if offered for leasing."

Section 2394 in turn provides (in relevant part) that:

"(a) Subject to subsection (b), the Secretary of a military department may enter into contracts for periods of up to 30 years --

"(1) under section 2689 of this title;

"(2) for the provision and operation of energy production facilities on real property under the Secretary's jurisdiction or on private property and the purchase of energy produced from such facilities."

The Senate report which accompanied the Fiscal Year 1979 Military Construction Authorization Act (from which section 2394 was derived) stated as follows with specific reference to the China Lake project:

"The committee notes the geothermal initiatives of the Defense Department and urges their aggressive exploitation.* * *

"The Department of the Navy is currently developing the Coso geothermal resource at Naval Weapons Center, China Lake, Calif. This is a Navy-owned resource which will be utilized to generate electricity up to a maximum amount specified by the Navy. Electricity generated in excess of the Naval Weapons Center's needs will be credited to other defense activities on the west coast. The present plan is to develop this resource utilizing private capital only, with no commitment of Navy funds other than to purchase the generated electricity. The Navy will enter into a contract only if it is in the Navy's best interest, that is if the expected cost of electricity generated for the geothermal resource and

delivered to defense activities will be less than that of the commercial rate schedule at any given time during the 30-year contract."

10 U.S.C. § 2481 provides as follows with respect to the sale of electric power to users within the vicinity of a Navy activity:

"(a) Under such regulations and for such periods and at such prices as he may prescribe, the Secretary concerned or his designee may sell or contract to sell to purchasers within or in the immediate vicinity of an activity of the * * * Navy * * *, any of the following utilities and related services, if it is determined that they are not available from another local source and that the sale is in the interest of national defense or in the public interest:

"(1) Electric power.

* * * * *

"(b) Proceeds of sales under section (a) shall be credited to the appropriation currently available for the supply of that utility or service * * *."

In a memorandum dated August 11, 1982, the Assistant General Counsel (Acquisition) of Navy's Office of General Counsel concluded that 10 U.S.C. § 2481 would preclude the sale of excess power generated by a Navy plant to a utility company. The memo pointed out that electricity sales under that section were authorized only to non-Government purchasers in the immediate vicinity of a military installation where electricity service was otherwise unavailable. The memo thus concluded that the sale of electricity to a utility which was already in a position to sell electricity to local, non-Government users was not within the limited authority provided by section 2481. The transfer of excess capacity generated by the Navy's plant to other Navy installations by means of wheeling was specifically suggested by the memo.

The current version of the Navy's contract is contained in Contract Modification P0004 to Contract No. N62474-79-C-5382. Modification P0004 gives the contractor the sole right to investigate, explore, develop and produce electricity on designated Navy lands at China Lake. The contractor is to be

paid only for electricity consumed by the Government. The contract provides that the contractor shall serve such additional designated delivery points as its generating capacity permits, and that once the contractor has agreed to supply electrical energy to a delivery point, it shall be solely responsible for delivering electricity in sufficient quantity to satisfy the electrical energy requirements of that delivery point. Although the contract provides that title to electricity generated by the contractor will be in the Navy, it further provides that:

"The electricity may be bartered, traded or sold as a means of paying for peak Navy energy requirements as well as such items as wheeling, banking, standby, emergency, backup, line transmission loss, metering loss, transformer loss, power factor, demand, termination charges, and the like."

The price of electricity is set by the contract for China Lake and must be negotiated for any additional delivery points, but is limited to 95 percent of applicable commercial utility rates.

According to the submission, the contractor asked SCE, which has the only transmission line passing near China Lake, if it would transfer ("wheel") the excess power to additional Navy/DOD activities in the SCE service area. SCE declined to wheel the power, but offered to purchase the excess power produced in accordance with the Public Utilities Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617. SCE also refused to credit Navy/DOD activities to the extent of the purchases it made from the contractor.

In our opinion, there is no legally significant difference between the wheeling of excess electricity over SCE transmission lines by the contractor to Navy facilities remote from China Lake and the sale of such excess electricity to SCE at less than commercial rates with subsequent purchase of identical amounts of electricity by the contractor at remote locations for delivery to the Navy. The term "wheeling" is not defined by the submission or by the contract. However, we assume that it refers to a process whereby electricity would be delivered to a utility transmission line with the understanding that an equivalent amount of electricity would be delivered, for a fee, to another location. The party providing electricity to a utility for wheeling to another location would apparently have a legal right to receive an amount of electricity equivalent to that wheeled at the agreed upon destination.

Although no corresponding automatic entitlement to delivery of electricity at a remote location would exist if it were simply sold to a utility, the right to buy from the utility at a remote location also served by the utility at commercial or other rates could certainly be contracted for as a condition of the sale. We understand that many if not all of the locations to which electricity would be delivered by the contractor are presently served by SCE. Similar purchase arrangements could also be arranged with other utilities to assure delivery of electricity.

Accordingly, the only significant difference between wheeling and sale and repurchase which we can perceive is one of cost. It seems likely that it would cost more to sell at less than commercial rates and repurchase at commercial rates than it would to transfer electricity from point to point for a fee.

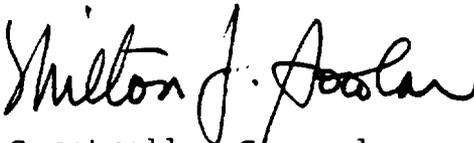
It is true that, as a general rule, the Government may not dispose of property without statutory authority. Thus, 10 U.S.C. § 2481 provides authority for the sale of electricity to private users in appropriate circumstances. However, in this case, the Navy, not private users, will be the ultimate beneficiary of electricity sold from the China Lake facility. Moreover, the contract does not require Navy involvement in the delivery of electricity to remote locations. This responsibility is left to the contractor, so long as electricity is delivered to remote locations at no more than 95 percent of commercial rates. Sale of electricity by the contractor required to accomplish contract requirements is also contemplated as indicated above. It further would appear that delivery by the contractor of electricity to remote locations accomplished by contractor purchase from the local utility company would be economically feasible, since the contractor could use the proceeds of the sale of electricity at PURPA rates to offset its cost of purchase at commercial rates for delivery to the Government at the contract price. Finally, the Government's right to require electricity from the contractor at remote locations would be contractually provided for. The net result of this arrangement would be the receipt at remote locations of an amount of electricity identical to that generated for that purpose at China Lake for a reduced price. Since the arrangement would be so clearly beneficial to the Government, we would not be inclined to take issue with it unnecessarily.

More importantly, the transfer of excess capacity to locations remote from China Lake was specifically contemplated by the Senate report quoted above. Similarly, the transfer of power, by wheeling, from one naval facility to another was considered by the Navy Office of General Counsel memorandum

discussed earlier as not precluded by 10 U.S.C. § 2481. We would agree with that view, and since we see no essential difference between wheeling and the arrangement proposed here, would also find the proposed arrangement unobjectionable.

It is therefore our conclusion that the described electricity delivery procedures whereby the contractor would sell electricity to SCE at PURPA rates and purchase equivalent amounts of electricity from SCE or another utility at locations remote from China Lake for delivery to the Navy further the purposes of 10 U.S.C. §§ 2394 and 2689 and are not barred by 10 U.S.C. § 2481. In order to assure that the Navy will receive electricity at remote locations at reduced rates, we suggest that the contract be modified to spell out the contractor's obligation to arrange with SCE or other utility companies for delivery of agreed upon amounts of electricity to the Navy and payment therefor by the contractor at commercial rates.

We note in closing that a provision specifically clarifying Navy's authority to arrange for the purchase of electricity under the described circumstances is contained in a currently pending Defense authorization bill. We suggest that the Navy consider the effect of that bill, when passed, on the proposed contractual arrangement.

for 
Comptroller General
of the United States